Union Fork and Hoe Company *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, Local 1916. Cases 3–CA–20278 and 3–CA–20720

June 17, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

On February 25, 1998, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Union Fork and Hoe Company, Frankfort, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a), (b), and (c):

''(a) Make whole its employees in the appropriate unit for any monetary losses that they suffered due to the Respondent's discontinuance of medical insurance coverage for certain of its employees upon retirement, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

''(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

''(c) Within 14 days after service by the Region, post at its Frankfort, New York facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 1996.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, Local 1916 (the Union) by discontinuing health insurance coverage for certain of our employees upon retirement, without giving prior notice of this change to

[1] In adopting the judge's conclusion that the Respondent had the authority unilaterally to discontinue its matching contributions to the 401(k) plan, Chairman Gould and Member Liebman rely solely on art. XVI of the parties' collective bargaining agreement, which, in addition to the provision cited by the ALJ, also states that the ''Employer will not be required to provide any 'employer matching contributions' under the 401(k) plan.'' They find it unnecessary to pass on the judge's finding that the cessation of the 401(k) match was a lawful part of the remediation of the Respondent's unlawful discontinuance of the active employees' retirement health benefits.

In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(5) of the Act by rescinding its 401(k) matching contributions, Member Brame agrees with the judge that the Respondent could rescind these contributions unilaterally both because it had the right to do so under the collective-bargaining agreement and because the cessation of the 401(k) matching contribution was part of the remedy, i.e., a return to the status quo ante, for the Respondent's unlawful discontinuance of the active employees' retirement health benefits. In this regard, Member Brame agrees with the judge that since the 401(k) matching contributions clearly were meant to assist employees who were losing their health insurance coverage, and was given in lieu of that coverage, the Respondent could rescind those matching contributions in order to return to the status quo when it restored the retirement health benefits at issue here.

[2] We shall modify the judge's recommended Order in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997), and *Indian Hills Care Center*, 321 NLRB 144 (1996). In addition, we shall provide that any amounts due employees be computed as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, we shall substitute a new notice that conforms to the recommended Order.

the Union or bargaining with the Union about this subject.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights governed you by section 7 of the Act.

WE WILL make whole, with interest, any of our employees for any monetary loss they suffered due to our unilateral discontinuance of health insurance coverage for certain of our employees upon retirement.

UNION FORK AND HOE COMPANY

Alfred M. Norek, Esq., for the General Counsel.
Louis P. Giqliotti, Esq. (Getnick, Livingston, Atkinson, Giqliotti & Priore, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 12, 1998, in Utica, New York. The amended consolidated complaint herein, which issued on August 27, 1997,[1] and was based upon unfair labor practice charges that were filed on September 10, 1996, and May 30 by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, Local 1916 (the Union) alleges that Union Fork and Hoe Company (the Respondent) violated Section 8(a)(5) of the Act by unilaterally changing its policy regarding health insurance coverage for current unit employees upon their retirement on about August 1, 1996, and by rescinding its practice of making contributions to the 401(k) deferral plan established for unit employees, on about May 2.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS AND ANALYSIS

The facts herein are rather straight and uncontroverted. The Union has been the collective-bargaining representative of Respondent's employees at its facility in Frankfort, New York, for in excess of 25 years. Briefly stated, until July 1996, the Respondent provided the unit employees with health insurance coverage, which continued after their retirement. On about August 1, 1996, the Respondent unilaterally discontinued this coverage for the unit employees after they retired, and, in lieu thereof, it announced a 1-percent match contribution to a 401(k) plan for those employees. After the Union filed a charge with the Board, the Respondent offered to settle the matter by rescinding the withdrawal of health insurance coverage for its employees upon retirement and offered to bargain about the matter. However, in order to return to the status quo, the Respondent also ceased making the 1-percent 401(k) matching contributions. The Board is alleging herein that this change, as well as the original change, are each unilateral changes in violation of Section 8(a)(5) of the Act.

The collective-bargaining agreement between the parties for the period 1992 to 1995 does not require the Respondent to pay health insurance for retirees or employees upon retirement, although the practice had been for the Respondent to provide such coverage for these individuals and their spouses, while employed and when they retired at age 65. One of the Union's proposals at the bargaining sessions for a new contract in 1995, was to require the Respondent to pay health insurance for retiring employees at age 62; the Respondent rejected this request, stating that it was too costly. The Union ''fabled'' this proposal, and there was no further discussions of making any changes in eligibility for health insurance at these negotiations. The new contract, effective from 1995 through 1998, for the first time, states that the Respondent would establish 401(k) plans for the unit employees, which would permit the employees to defer under the plan the maximum portion of his salary permitted by law. ''However, the employer reserves the right, in its sole discretion, at any time, to begin making employer matching contribution under the 401(k) plan.''

On July 21, 1996, Richard Denny, then director of human resources for the Respondent told the Union that employees who retired would no longer be covered for medical insurance by the Respondent, with two exceptions. Employees who retired at age 50 with 10 years of service, or employees with 25 years of service would continue to receive medical insurance coverage from the Respondent, all other retirees would not. The union representatives argued that this was a negotiated benefit and could not be changed without bargaining with the Union. Denny told them that to offset the cost of insurance for these retiring employees, the Respondent would make a 1-percent match to the employees' 401(k) plan. The Respondent, in a letter to the unit employees dated July 26, 1996, discussed the high cost of medical coverage, and stated, inter alia:

> Union Tools can no longer afford to continue providing this coverage to new retirees and their dependents without significantly impacting our ability to provide competitive benefits to you, our active employees and your dependents. As a result, employees retiring on and after August 1, 1996, with two exceptions, will no longer be offered retiree medical coverage . . . .
>
> The two exceptions . . . employees who, as of August 1, 1996, are covered by our active medical insurance and who meet one of the following two criteria:
>
> 1. Having attained the age of 50 and have minimum of 10 years of service with Union Tools; or
>
> 2. Are under the age of 50 but have minimum of 25 years of service with Union Tools.
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> In an effort to assist you in providing for your health care upon your retirement, the Trustees have elected, effective January 1, 1997, to add a match to

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1997.

> your 401(k) deferral plan as follows: 100% of the first 1% that you contribute.

Anthony Tarnacki, union president, testified that July 21, 1996, was the first time that the Union was notified of this change, and the Respondent never bargained, or offered to bargain, about the change. During the prior negotiations, the Respondent never raised the possibility of making this change. About 7 percent of the employees in the bargaining unit chose to participate in the 401(k) matching plan.

On August 1, 1996, the Union filed a grievance regarding this change in medical insurance coverage for retirees; the Respondent defended that these changes were proper because the Union does not represent retirees. The Union withdrew the grievance in order to proceed with the unfair labor practice charge.

On May 2, Tarnacki and the Union's international representative, Rocco DeRollo, met with Don Keeler, plant manager; Tom Lefaivre, personnel manager; and Joe Oliver, Respondent's controller; Denny had resigned 2 months' earlier. DeRollo asked what the Respondent was going to do about the unfair labor practice charge with the Board about the change in medical insurance for retiring employees. Keeler said that the Respondent was willing to rescind the change that it made and would begin negotiating with the Union about medical insurance. DeRollo said that the 401(k) payments should not be tied into the changes, Keeler said: ''Yes, it was all a package deal that they were both proposed together.''

Letters that DeRollo and Keeler exchanged subsequent to this meeting frame the issues herein rather well. DeRollo's letter of May 7 states, inter alia:

> The Company notified the Union that it would not refuse to bargain with the Union over the decision and any proposed changes that the Company desires to make over health care benefits for current unit employees upon their retirement.
>
> . . . the Company would rescind all unilateral changes of August 1, 1996 that were made to the health care plan for employees upon their retirement and would reinstate the health care plan which was in effect July 31, 1996. Additionally, the Company stated that it would concurrently rescind the Company's match of one percent to employees 401(k) deferral plan. To avoid the upcoming trial the Company stated it would contact the NLRB and enter into a settlement agreement prior to the first bargaining session which was proposed by the Company to be conducted May 15, 1997.
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> The Union, upon notice that the Company desired to change health care benefits that were in effect July 31, 1996, stated that it would exercise its rights and engage in bargaining over the decision and any propose changes concerning the health care issue but objected to the revocation of the Company match to the 401(k) plan.
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> The Union argued that the Company match to the 401(k) plan effective January 1, 1997 was not disputed by the Union in its charge against the Company and the Company's subsequent decision to unilaterally revoke the match is unlawful under both the National Labor Relations Act and our Collective Bargaining Agreement and as such the Union would take appropriate measures to enforce its rights.

By letter dated May 13, Keeler wrote to DeRollo, inter alia:

> You are correct that the Company offered to commence bargaining about the proposed changes to health care benefits for current bargaining unit employees upon their retirement. More importantly, the Union accepted that offer. Thus, on May 6, 1997 the Company signed the Settlement Agreement proposed by the NLRB and is forwarding the same to the Labor Board. So that it will not be accused of bargaining in bad faith the Company is required to return to the status quo. Thus, we advised you that the Company would rescind all changes made to health care benefits for current bargaining unit employees that were implemented effective August 1, 1996.
>
> However, the Company elected, effective January 1, 1997, to match bargaining unit employee's contributions to their 401(k) deferral plan as follows: 100% of the first 1% contributed. A memorandum sent to bargaining unit employees dated July 26, 1996 made clear that the match was being provided ''In an effort to assist you in providing for your health care upon your retirement. . . .'' Thus, the 401(k) match was inextricably linked to the elimination of health care benefits for bargaining unit employees upon their retirement.
>
> Therefore, please be advised that effective May 22, 1997 the Company will rescind the changes which it made to the health care plan for current employees on August 1, 1996. In addition, the Company will cease to make the 401(k) match.

On about May 15 the Respondent posted a notice at the plant setting forth the history of this dispute. The notice concludes:

> In an effort to resolve the dispute the Company recently offered to bargain over the issue and the Union has agreed to do so.
>
> In order to bargain in good faith the Company has now rescinded the changes which it made on August 1, 1996.
>
> Because the Company has now rescinded the changes it made August 1, 1996, please be advised that it will no longer continue to add a match to your 401(k) deferral plan.
>
> The match will be discontinued for the payroll beginning May 22, 1997.

As stated in this notice, the Respondent ceased making the 401(k) matching payments effective May 22. The Union grieved the cessation of the 401(k) payments, and the Respondent defended that if they rescinded the changes, they could rescind the 401(k) payments. The Union subsequently withdrew this grievance.

In *Allied Chemical Workers of America Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971), the Supreme Court determined that retirees were not employees within the meaning of Section 2(3) of the Act and that retir-

ees' insurance benefits were not a mandatory subject of bargaining. However, the Court also stated that ''the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.'' *Midwest Power Systems*, 323 NLRB 404 (1997). It is undisputed that the Respondent never negotiated, or offered to negotiate, with the Union about the proposed change prior to its implementation on about August 1, 1996. Therefore, this unilateral change in medical insurance coverage for active employees upon retirement violated Section 8(a)(5) of the Act.

What takes this case out of the ordinary is the remaining allegation that by attempting to return to the status quo on about May 2, by rescinding the prior change and offering to bargain about it, *and rescinding the 401(k) payments*, the Respondent further violated Section 8(a)(5) of the Act. The General Counsel alleges that since the Respondent rescinded this 401(k) provision, a mandatory subject of bargaining, without prior negotiations with the Union, it violated Section 8(a)(5) of the Act. The Respondent defends that it could rescind these payments in order to return to the status quo, and that since the contract gave it the right, *in its sole discretion*, to begin making matching contributions under a 401(k) plan, it could likewise, unilaterally, stop making these contributions. As there is no evidence to establish that upon making these contributions between January 1 and May 22 the Respondent commmitted itself to continuing them, I agree that the Respondent can unilaterally discontinue future 401(k) matching contributions. It generaly follows that if the Respondent had the sole discretion to make these contributions, it likewise had the sole discretion to not make these matching payments.

Counsel for the General Counsel, in his brief, argues that the rescission of the 401(k) plan contributions in May 1997 ''is a separate and discrete act from its earlier unilateral action. . . . that Respondent acted at its peril when it linked restoration of medical coverage to elimination of 401(k) matching contributions.'' I disagree. The 401(k) contribution was clearly seen by the Respondent, the Union, and the employees as an alternative to medical insurance coverage for employees upon retirement and the Respondent, in its July 26, 1996 letter to its employees, so stated. I would have to close my eyes to reality to believe that these two benefits were separate and distinct; rather, the 401(k) plan contributions clearly were meant to assist employees who were losing their health insurance coverage, and was given in lieu of that coverage. I, therefore, find that the Respondent did not violate the Act when it ended the 401(k) matching payments at the same time that it reinstated medical insurance coverage for retiring employees, and would, therefore, recommend dismissal of this allegation of the complaint.

CONCIUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) of the Act by unilaterally discontinuing medical insurance benefits for its employees upon retirement.

4. The Respondent did not violate the Act as further alleged in the complaint.

THE REMEDY

I have found that the Respondent unilaterally discontinued medical insurance coverage for certain of its employees upon retirement on about August 1, 1996. However, in May the Respondent rescinded this change, reinstate these benefits for its employees upon retirement, and offered to bargain with the Union about this subject. It is, therefore, no longer necessary to order the Respondent to rescind the change and to bargain with the Union about this subject, as they have already agreed to do so and have so informed the Union. I shall, however, recommend that the Respondent be ordered to reimburse any employee who suffered a loss due to the Respondent's action, such as any employee who retired between August 1, 1996, and May, and did not receive health insurance coverage from the Respondent, resulting in unreimbursed medical expenses during that period. Because I have found that the withdrawal of the 401(k) plan on about May 2 did not violate the Act, it is unnecessary to discuss the case law which allows a charging party union to decide which of the unlawful unilateral changes should be maintained and which shall be rescinded. *Herman Sausage Co*., 122 NLRB 168 (1958); *California Pacific Medical Center v. NLRB*, 87 F.3d 304 (9th Cir. 1996).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Union Fork and Hoe Company, Frankfort, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by discontinuing health insurance coverage for certain of its employees upon retirement, without giving prior notice of this change to the Union or bargaining with the Union about this subject.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its employees in the appropriate unit for any monetary losses that they suffered due to the Respondent's discontinuance of medical insurance coverage for certain of its employees upon retirement.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, and all other records necessary to analyze the amount due herein.

(c) Post at its office and place of business in Frankfort, New York, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Re-

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a

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gional Director for Region 3, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''